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No. 194 Misc.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

ROBERT HUBBARD and
LAVINIA HUBBARD, His Wife, - - Petitioners,

vs.

HENRY L. BROOKS, United States District Judge for the Western District of Kentucky, - - - - - - - - Respondent.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

ROBERT HUBBARD and
LAVINIA HUBBARD, His Wife,
Petitioners.
Kentucky Home Life Building,
Louisville 2, Kentucky.

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May it please the Court:

Though lengthy, though containing some matter, at first brush, seemingly irrelevant and immaterial, yet we again very earnestly and most respectfully request the Court, and each member thereof, to carefully and thoughtfully read and consider our petition in its entirety.

For reply to "Memorandum for The United States in Opposition", we boldly and emphatically, but very respectfully, deny: (1) that our petition is premature; see Paragraph 9-a, pages 14-18 of our Petition, and especially ex parte Peru, 318 U. S. 578, 63 S. Ct. 793, 87 L. Ed. 1014. Stratton v. St. Louis Southwestern Railway Co., 282 U. S. 10, 16, 51 S. Ct. 465, 75 L. Ed. 135, cited by the Solicitor General, Honorable J. Lee Rankin, supports Petitioners, for in that case this Court said: "Accordingly, where a Court of three judges should have been convened, and was not, this Court may issue a Writ of Mandamus to vacate the Order for Decree entered by the District Judge," etc.;

(2) Deny that our petition does not present a substantial Federal Constitutional question; but most respectfully assert that it does present a very, very substantial constitutional question, and Petitioners, under U. S. C., Section 1651-a (see page 5 of their Petition), and Rule 32 (3) of this Court have a right to make their Motion and file their Petition direct to this Court. See Paragraphs Nos. 3 and 4, pages 2-6, Paragraph No. 6, pages 6-9, Paragraph 9-A, pages 14-18, Paragraphs 9-D (4) (5) (6) and (7), pages 29-46 of their Petition and authorities cited therein. The Constitutional issue raised by their Petition most certainly involves "*a question of urgent and overriding public importance*" or "*the question is of such a nature that it is peculiarly appropriate that such an action should be taken.*" The question involved in the instant case is whether or not it is contrary to the Fifth Amendment of the Constitution of the United States

to permit, *without notice or hearing, ministerial officers of the Department of Revenue to assess PENALTIES, not deficiency taxes, on income taxpayers. Every income taxpayer—there are literally millions of us—is affected thereby, hence Petitioners raise a very substantial constitutional issue.* We respectfully maintain that the facts and issues in Wicks v. Southern Pacific Company, 231 Fed. 2d 130, cited by the Solicitor General, are materially, substantially and clearly different from the facts in and issues involved in the instant case;

(3) Deny that Sections 272 (a) and (c) of the Internal Revenue Code of 1939 provide adequate notice and hearing within the requirements of due process clause of the Fifth Amendment. See our Petition, pages 29 through 45, and the authorities therein cited. Phillips v. Commissioner, 283 U. S. 589, 597-600, 51 S. Ct. 608, 75 L. Ed. 1289, cited by the Solicitor General has no application, and is clearly distinguishable from the instant case, *because in that case no question of penalties or the imposition of penalties without notice or hearing was involved. In that case the Commissioner assessed deficiency taxes—not PENALTIES, and distrained for the deficiency.* Certainly the Commissioner, without any violation of constitutional rights, has a right to assess deficiency taxes and distrain for their collection.

(4) Deny that the Statute which prohibits a taxpayer from enjoining a Collector from assessing and collecting penalties has any application to the case at bar. See Paragraph 9-D (2), pages 24-29 of our Petition; Helvering v. Mitchell, 303 U. S. 391, 58 S. Ct. 630,

has no application to the instant case, for in that case no question of penalties was involved.

(5) They deny that Petitioners have an adequate remedy at law where penalties are involved. In Allen, Collector v. Regents University System of Georgia, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448, this Court said:

> "What we have said indicated that Rev. Stat. Section 3224, *supra*, does not oust the jurisdiction. *The statute is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent, but of a PENALTY* for the failure to collect it from another."

Petitioners present the same situation in the case at bar that was before this Court in Allen, Collector *supra*.

For reasons set forth in our original Petition, and hereinabove set forth, we most respectfully submit that the Petitioners, and every income tax payer in the United States is affected, and that they are entitled to relief sought.

Respectfully submitted,

ROBERT HUBBARD and
LAVINIA HUBBARD,
Ky. Home Life Bldg.,
Louisville 2, Ky.,
Petitioners.